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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH DANIEL GONZALEZ,

Defendant and Appellant.

E045241

(Super.Ct.No. RIF131789)

OPINION

APPEAL from the Superior Court of Riverside County. Douglas E. Weathers,
Judge. Affirmed.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton, Susan
Miller and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Joseph Daniel Gonzalez guilty of carrying an unregistered

firearm (Pen. Code, § 12031, subd. (a)(2)(f);¹ count 1); active participation in a criminal street gang (§ 186.22, subd. (a); count 2); and carrying a loaded firearm while being an active member of a criminal street gang (§ 12031, subd. (a)(2)(C); count 3). The jury also found true gang enhancements as to counts 1 and 3 (§ 186.22, subd. (b)). The trial court sentenced defendant to four years in state prison.

On appeal, defendant contends the trial court erred in allowing into evidence letters from gang members and a photo of a gang member. Defendant also asserts there was insufficient evidence to establish the street gang conviction and enhancements. Defendant further complains the prosecutor committed prejudicial misconduct by eliciting gang evidence in violation of the trial court's ruling excluding it, and erred in allowing evidence of defendant's prior bicycle theft offense.

We conclude there was no reversible error, including cumulative error. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1232.) We affirm the judgment.

1. Facts

In the afternoon, on August 6, 2006, Riverside Police Officer Brent Fast was patrolling Casa Blanca gang territory when he noticed defendant riding a bicycle on the sidewalk in violation of the municipal code. Fast, who was in a marked patrol car, tried to stop defendant. Defendant attempted to flee and did not stop until Fast pointed a taser gun at him. Defendant was wearing a jersey and hat with words and symbols indicating

¹ Unless otherwise noted, all statutory references are to the Penal Code.

he was a Casa Blanca gang member. Defendant also had several gang tattoos on the back of his neck.

Fast searched defendant and found a loaded .22-caliber revolver in defendant's right pants pocket and six .22-caliber rounds in his left pants pocket. The gun was not registered to defendant.

After defendant was arrested and advised of his *Miranda*² rights, defendant said he had been "part of" the Casa Blanca gang since he was 10 years old. He also said he had the gun he was carrying for a while but would not say where he got it.

When defendant was booked into jail, Deputy Kenneth Dawley interviewed defendant. In response to Dawley asking defendant if he had any gang affiliation, defendant said he was "an I.E. Riders[sic] out of Casa Blanca."

Detective Michael Stamps, who was with the Riverside Police Department gang intelligence unit, provided expert gang testimony at defendant's trial. He testified he was familiar with the Casa Blanca gang and had investigated numerous crimes committed by the gang. Casa Blanca is a neighborhood in Riverside. Defendant was living in that neighborhood when he committed the charged crimes. Stamps explained that the Casa Blanca gang is divided into groups or factions, including the Inland Empire Riders, also known as the "I.E. Riders," and the "Vagabundos." There had been numerous murders, assaults, attempted murders, and shootings between the Casa Blanca factions. Some of the factions worked together.

² *Miranda v. Arizona* (1966) 384 U.S. 436.

Stamps was familiar with the Casa Blanca gang's signs and symbols. According to Stamps, "CB" stands for "Casa Blanca"; "CBR" stands for "Casa Blanca Rifa"; "WHR" stands for "White House Riva," the English translation of "Casa Blanca"; "32" stands for the third letter of the alphabet, "C" and "2" stands for the second letter, "B." The Casa Blanca Rifa and I.E. Riders faction used the following symbols to designate their gang: "CB Street," "ST," "IER," "13," "32," and the color blue. Stamps explained that the number "13" is a significant gang number because "M" is the 13th number of the alphabet, and "M" stands for the Mexican Mafia, a prison gang. All Southern California Hispanic street gangs are influenced by the Mexican Mafia. The Casa Blanca gang factions' symbols include "VBS" for the "Vagabundos," "IER" for the "I.E. Riders," and "CB ST" for "Casa Blanca Street."

Gang members proudly wear clothing identifying their gang. They also have tattoos showing they have a strong commitment to a gang. If someone claims to be a member of a gang, most likely this is true because, if not, that person risks retaliation and violence.

Stamps explained that weapons play an important role in the gang lifestyle. They are used daily to attack rival gang members, to protect themselves from rival gang members, to commit acts of intimidation against citizens in the community, and to commit crimes. Carrying a concealed, loaded firearm is a common gang crime.

According to Stamps, defendant's clothing and tattoos indicated that on August 6, 2006, defendant was an active member of the Casa Blanca I.E. Riders gang. At the time of the charged gun possession offense, defendant was riding down the street, wearing a

jersey that said “South Side 13” on it, and on the front of his hat was embroidered the name of the gang, “Casa Blanca Street.” On the back, was embroidered, “I.E. Riders.” In addition, defendant had admitted several times he was a member of the I.E. Riders and was known to associate with Casa Blanca gang members.

Defendant also had a “Casa Blanca Street” tattoo and the Riverside bell on the back of his head, indicating he was in a gang. The Riverside bell tattoo is not gang specific but, when included with other gang tattoos, indicated defendant was in a gang. Stamps noted that on the date of the charged offenses, defendant’s head was shaved. Gang members typically shaved their heads, although nongang members might also do so.

Midtrial, Stamps searched defendant’s jail cell and found letters to defendant from Casa Blanca gang members, and photos of individuals Stamps recognized as Casa Blanca gang members. The letters were dated one to two months before the trial. One of the photos was of defendant’s brother, who was shown with an I.E. Riders gang member.

Stamps testified that he believed that defendant committed the crime of carrying an unregistered, loaded firearm, for the benefit of the Casa Blanca I.E. Riders gang. Stamps concluded this based on evidence defendant was carrying the gun for the purpose of assaulting and protecting himself from rival gang members. Defendant was riding around, wearing clothing promoting his gang, and thus would expect to be challenged. In addition, gang members commonly carried guns to intimidate and assault the public and to transport guns to other gang members.

Defendant testified that he was not a gang member but before and after the charged crimes he had associated with gang members who were his friends. Defendant claimed that while he was in custody, he met the individuals who sent him the letters found in his jail cell. He did not know them before then. With regard to the gun he was carrying, defendant said he was carrying it because two weeks before he was arrested, he found the gun and ammunition in a field, picked it up, and hid it in his bedroom closet for two weeks, until he had a chance to get rid of it. When he was arrested, he was attempting to get rid of the gun or give it to one of his uncles.

2. Admissibility of Jail Cell Letters and Photo Evidence

Defendant contends the trial court violated his federal constitutional rights to due process and a fair trial by allowing the prosecution's gang expert, Detective Stamps, to testify that he found gang-related letters and photos in defendant's jail cell.

A. Background Facts

On Tuesday, the third day of trial, the prosecutor informed the court that she had just provided defense counsel with a packet containing copies of letters and photos the prosecutor had received that morning from Detective Stamps. The preceding Friday afternoon, Stamps had conducted an investigation of defendant's jail cell and found the letters and photos. The prosecutor requested the court to allow Stamps to rely on the evidence in testifying as a gang expert.

Defense counsel objected to the newly discovered evidence on the grounds the gang evidence was discovered 14 months after commission of the charged offenses, and therefore it was not relevant. Furthermore, the evidence was prejudicial because it would

reveal to the jury that defendant was incarcerated. In addition, defendant shared his cell with other inmates and it was unknown how long the items had been on his desk.

The prosecutor argued that she was willing to sanitize the evidence by having the gang expert testify that he searched defendant's room and found a letter from the leader of the Casa Blanca Vagabundos gang, Robert Hernandez, who was requesting that the I.E. Riders and Vagabundos join forces and merge together to create a stronger gang presence in Riverside County. The prosecutor asserted the evidence was highly relevant to establishing that defendant had been and continued to be an active participant in a gang and was possibly a gang leader.

The court took the matter under submission and later ruled that, with regard to the correspondence found in defendant's jail cell, Detective Stamps could testify to finding letters from gang members in defendant's jail cell but the letters would not come into evidence because they contained hearsay. Stamps could also testify to the writing on the envelopes, but not to the letter contents.

The court considered the admissibility of a photo of I.E. Riders gang member, Matthew Thompson, with defendant's brother, Giovanni Gonzalez, displaying gang signs, and a photo that appeared to be a high school prom photo of Thompson and his date. These two photos were found in defendant's jail cell. Defense counsel objected to the photo, and the trial court overruled the objections.

B. Stamps's testimony

During the trial, Stamps testified that he searched defendant's room on October 5, 2007, and found a letter dated September 17, 2007, addressed to defendant, from Robert

Hernandez. Stamps had seen photos of Hernandez with other Vagabundos gang members displaying gang signs. Hernandez had a tattoo, “I.E.,” on the back of his neck. Stamps also found in defendant’s room two letters from Casa Blanca gang member, Scottie Reed. Reed belonged to the Los Diablos faction. The letters were dated September 14, and 27, 2007. There were also photos in defendant’s room, one of which was of Matthew Thompson, who was an I.E. Riders gang member (Exh. 51). Another photo was of Giovanni Gonzalez, defendant’s brother (Exh. 52).

The prosecutor showed Stamps a photo found on Thompson’s MySpace website account, which Stamps had recently discovered (Exh. 50). Stamps said the photo, which was shown to the jury, was of Casa Blanca gang member Manuel Cruz, who was displaying gang signs indicating “I.E.” for “Inland Empire.” Thompson was also in the photo, displaying the hand sign for Casa Blanca, consisting of a “C” and a “B.”

C. Analysis

Defendant argues that allowing the jail cell evidence violated Evidence Code section 352 because the evidence was unduly prejudicial since it was the only evidence supporting a finding that defendant actively participated in a criminal street gang.

“[A]s [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) [E]ven if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury. (*People v. Williams* [(1997) 16 Cal.4th 153, 193];

People v. Carter (2003) 30 Cal.4th 1166, 1194, [evidence of defendant's gang membership although relevant to motive or identity creates a risk the jury will improperly infer defendant has a criminal disposition and is therefore guilty of the charged offense and thus must be carefully scrutinized].)" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223-224 (*Albarran*).)

In reviewing the trial court's admission of evidence, we apply the abuse of discretion standard of review. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.) Here, the letters and photos found in defendant's jail cell during the trial had minimal probative value since they were discovered over a year after defendant committed the charged crimes and the letters were written over a year after the crimes. Although the evidence showed that defendant was associating with Casa Blanca gang members while in prison shortly before the trial, the evidence did not establish defendant was actively involved in a gang when he committed the crimes. An inference could be made that since defendant was associating with gang members while in prison, he was in a gang when he committed the charged crimes 14 months earlier, but such an inference based solely on the jail cell evidence is too tenuous.

On the other hand, evidence establishing that defendant associated with Casa Blanca gang members was no more prejudicial than any of the other admissible gang evidence. Thus, regardless of whether the trial court erred in allowing the evidence, we conclude there was no prejudicial error under either the state or federal harmless error standards. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) It is not reasonably probable that the trial

result would have been more favorable had the evidence been excluded. (*Watson, supra*, at p. 836.) Furthermore, the admission of the evidence was not so serious as to violate defendant's federal constitutional rights to due process, rendering his trial fundamentally unfair. (*Albarran, supra*, 149 Cal.App.4th at pp. 228-229.)

There was other admissible evidence that defendant was an active participant in the Casa Blanca I.E. Riders gang at the time he committed the charged offenses. Defendant admitted prior to and after the charged offenses that he was a gang member and had been involved in a gang for over 10 years. His clothing, tattoos, and associations with other Casa Blanca gang members established this as well.

Stamps's testimony as a gang expert further supported a finding that defendant was actively participating in a gang when he committed the charged offenses. An expert can testify on a defendant's membership in a gang and whether and how a crime was committed to benefit or promote a gang. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197.) Stamps's testimony, along with other gang-related evidence, established that defendant was an active gang member at the time of the charged crimes.

The instant case is distinguishable from *Albarran, supra*, 149 Cal.App.4th 214, in which the court held that the erroneous introduction of gang evidence constituted prejudicial error under *Chapman*. In *Albarran*, there was no other admissible gang evidence and therefore the jury would not have been aware of the defendant's gang involvement had the gang evidence been excluded. Here, there was overwhelming admissible gang evidence establishing defendant's involvement in a gang, even in the absence of the jail cell evidence.

We thus conclude that any error in allowing the jail cell evidence was harmless error under both *Watson, supra*, 46 Cal.2d at page 836, and *Chapman, supra*, 386 U.S. at page 24.

3. Sufficiency of Evidence Supporting Gang Enhancements

Defendant contends that the evidence was insufficient to support the true findings on the gang enhancements as to count 1 (carrying an unregistered firearm) and count 3 (carrying a loaded firearm while being an active member of a criminal street gang). (§ 186.22, subd. (b)(1).)

The California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.) (the STEP Act) includes a sentence enhancement provision for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1); *People v. Vy* (2004) 122 Cal.App.4th 1209, 1221 (*Vy*).)

A gang enhancement true finding must be based on substantial evidence. (*Vy, supra*, 122 Cal.App.4th at pp. 1221, 1224; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.) In determining whether substantial evidence supports a gang enhancement, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements true beyond a reasonable doubt. (*Vy, supra*, 122 Cal.App.4th at p. 1224.) Reversal is unwarranted “unless it appears ‘that upon no hypothesis whatever is there sufficient substantial

evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Defendant argues there was insufficient evidence that the gun possession crime was committed (1) for the benefit of, at the direction of, or in association with any criminal street gang and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b)(1).) The first element concerns the nature of the crime and whether the crime benefits the gang. The second element concerns defendant’s state of mind when committing the offense. Defendant argues that evidence that he merely looked like a gang member was not sufficient to establish that the charged offense was committed for the benefit of a gang, or that he specifically intended to benefit a gang by committing the crime.

We conclude the evidence was sufficient. Stamps provided expert opinion testimony that he believed defendant committed the gun possession offense for the benefit of his gang. Stamps explained that gang members carry guns for the purpose of being able to assault rival gang members, protect themselves from rival gang members, intimidate the public, and assault law-abiding members of the community. Stamps stated that defendant’s act of riding around on his bicycle with his gang name displayed on his hat and clothing, while carrying a loaded, unregistered gun, benefited his gang because defendant was advertising he was a member of his gang and he knew he might be challenged by rival gang members and would need his gun to defend himself and his gang. When defendant was arrested, he was carrying a loaded gun and extra ammunition in his pants pockets.

Defendant argues that Stamp's expert testimony, that defendant was carrying a gun for the benefit of a gang, was insufficient to support the gang enhancements because there was no independent evidence supporting Stamp's testimony that defendant's gun possession crimes benefitted the gang. Evidence of defendant's appearance and gun possession, along with Stamp's expert testimony, was sufficient to support the gang enhancements.

Citing *Albarran, supra*, 149 Cal.App.4th at pages 231-232, defendant argues case law has rejected the argument that a gang is benefited by a gang member carrying a gun merely because the gun is carried for the purpose of attacking, intimidating, and gaining respect. *Albarran* is distinguishable. *Albarran* involved a drive-by shooting and there was no evidence that those possessing the guns blatantly displayed their gang membership, as defendant did in the instant case. (*Id.* at p. 227.) Furthermore, the issue in *Albarran* was whether there was evidence supporting a finding of gang motive for the robbery (*ibid.*), not whether the evidence supported a gang enhancement.

Defendant's reliance on *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank*), is also misplaced. In *Frank*, the defendant was stopped by police after failing to stop at a red stop light while riding a bicycle alone. (*Id.* at p. 1195.) The officer discovered the defendant was carrying a concealed knife, some methamphetamine, and a red bandana. (*Ibid.*) The defendant later told the officer he needed the knife for protection because two days before he had been attacked by gangsters who believed the defendant supported a rival gang. The defendant said he had friends in the rival gang. (*Ibid.*) A gang expert testified defendant was an active gang member and was in possession of the knife to

protect himself from rival gang members. The expert further testified that the defendant's possession of the knife benefited his gang by providing him with protection if attacked. (*Ibid.*)

The *Frank* court reversed the gang enhancement finding, stating: "We publish this case to emphasize that crimes may not be found to be gang-related based solely upon a perpetrator's criminal history and gang affiliations." (*Frank, supra*, 141 Cal.App.4th at p. 1195.) The *Frank* court further noted that "The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense." (*Id.* at p. 1199.)

Here, unlike in *Frank*, defendant was in his own gang's territory and he was wearing clothing flaunting his gang membership. He therefore had reason to expect that this would provoke a confrontation by rival gang members and he would then use his gun to protect himself.

Even though at the time of defendant's gun possession crime, defendant was not accompanied by other gang members and there was no victim, there was sufficient evidence to support the gang enhancement finding. Stamps's gang expert testimony, in conjunction with evidence of defendant's clothing and tattoos advertising his gang membership, and his possession of a loaded, unregistered gun and extra ammunition in his pocket, constituted sufficient evidence to support a reasonable finding that the firearm possession crimes were committed (1) for the benefit of, at the direction of, or in association with any criminal street gang and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b)(1).)

4. Sufficiency of Evidence Supporting Criminal Street Gang Conviction

Defendant contends there was insufficient evidence to support his convictions for participating in criminal street gang activity (count 2; § 186.22, subd. (a)) and carrying a gun while being an active street gang member (count 3; § 12031, subd. (a)(2)(C)). These two offenses require that the defendant actively participated in a criminal street gang. Defendant asserts there was insufficient evidence establishing this element.

Defendant's conviction for carrying a loaded firearm while being an active gang member, in violation of section 12031, subdivision (a)(2)(C), requires the same element of active participation in a criminal street gang as that required for a conviction under section 186.22, subdivision (a).³ As our high court explained in *People v. Robles* (2000) 23 Cal.4th 1106, 1115, "we construe section 12031(a)(2)(C)'s phrase 'active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22' as referring to the substantive gang offense defined in section 186.22(a). . . . Thus, carrying a loaded firearm in public becomes a felony under section 12031(a)(2)(C) when a defendant satisfies the elements of the offense described in section 186.22(a). Those elements are 'actively participat[ing] in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity' and 'willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang.' (§ 186.22(a).)"

³ Reference to subdivision 186.22, subdivision (a) is hereinafter referred to in this opinion as section "186.22(a)."

In *People v. Castenada* (2000) 23 Cal.4th 743 (*Castenada*), our high court construed the words, “actively participates in any criminal street gang” (§ 186.22(a)) as meaning “involvement with a criminal street gang that is more than nominal or passive.” (*Castenada, supra*, at p. 747; see also p. 752.) The court in *Castenada, supra*, held there was sufficient evidence to support a section 186.22(a) conviction for participating in a criminal street gang activity, when the defendant committed a robbery. (*Castenada, supra*, at pp. 752-753.) The *Castenada* court explained: “To summarize, through evidence of the crimes defendant here committed, his many contacts on previous occasions with the Goldenwest criminal street gang, and his admissions by bragging to police officers on those occasions of gang association or membership, the prosecution presented sufficient proof that defendant ‘actively participate[d]’ in a criminal street gang within the meaning of section 186.22(a).” (*Id.* at p. 753.)

While *Castenada* differs factually from the instant case in that the *Castenada* defendant was accompanied by two other gang members when he committed the underlying robbery, nevertheless, here, there was sufficient evidence to support a section 186.22(a) conviction. Evidence that defendant actively participated in a gang at the time of the gun possession crime included evidence that prior to, as well as after the charged offenses, defendant associated with Casa Blanca gang members; defendant admitted to several officers before and after committing the charged offense that he was a gang member; defendant admitted at trial that prior to and at the time of the charged crimes he associated with Casa Blanca gang members; over a year before the charged crimes, police found in defendant’s home items belonging to defendant that had gang initials on them,

along with graffiti paper and spray paint, which defendant admitted at trial belonged to him; defendant wore clothing and had tattoos advertising his gang membership; defendant was carrying an unregistered, loaded gun, along with ammunition; defendant was arrested in his gang's territory; and gang expert, Stamps, testified he believed defendant was an active gang member at the time of his arrest for gun possession. Stamps also concluded defendant's gang benefited from defendant committing the charged gun possession offenses by virtue of defendant using the gun for protection while advertising his gang membership.

This evidence was more than sufficient to establish defendant actively participated in a gang when he committed the gun possession offenses.

5. Prosecutorial Misconduct

Defendant contends the prosecutor committed prejudicial error by eliciting testimony from Stamps that the gang moniker, "Downer," belonged to defendant. The People argue defendant waived this objection by not raising it in the trial court and, in any event, any such error was harmless.

During the trial, Stamps testified that he was familiar with the monikers of various Casa Blanca gang members. He named some of the gang members' monikers, including the moniker, "Downer," and testified that he was familiar with the individuals who used the monikers. The prosecutor asked Stamps who used the moniker, "Downer," and Stamps named defendant. Defense counsel objected, and out of the presence of the jury the court asked Stamps how he knew "Downer" was defendant's moniker. Stamps explained that there was graffiti in defendant's jail cell indicating this.

The trial court noted that it had previously ruled that evidence of the graffiti in defendant's cell would not be admitted because there had been other occupants in defendant's cell. Defense counsel moved for a mistrial, which the trial court denied. Instead, the trial court admonished the jury that it was striking from the record Stamps's testimony that he believed the moniker, "Downer," belonged to defendant. The court further instructed the jury to disregard the testimony and not consider it for any purpose.

Since the prosecutor objected during the trial to Stamps's testimony regarding defendant's moniker and also moved for a new trial, the issue was not waived and will be decided on the merits.

Regardless of whether the prosecutor committed misconduct by improperly eliciting testimony revealing defendant's gang moniker, any such error was harmless. Normally, a defendant's conviction will not be reversed for prosecutorial misconduct unless it is reasonably probable that the jury would have reached a result more favorable to the defendant had the misconduct not occurred. (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

While Stamps's testimony that the gang moniker, "Downer," belonged to defendant indicated defendant was an active gang member, the evidence does not require reversal because the testimony was brief, the court admonished the jury not to consider it, and there was an abundance of other evidence establishing defendant was an active gang participant at the time of the charged offenses. Defendant admitted at trial that he had friends that were gang members. There was also evidence defendant admitted before and after commission of the charged crimes that he was a gang member.

Stamps's brief testimony regarding defendant's moniker was harmless under both the *Chapman* and *Watson* harmless error standards. (*Watson, supra*, 46 Cal.2d at p. 836; *Chapman, supra*, 386 U.S. at p. 24.)

6. Admission of Evidence of Defendant's Previous Conviction for Bicycle Theft

Defendant contends the trial court committed prejudicial error by allowing evidence of his prior felony conviction for stealing a bicycle.

During the trial, the prosecution filed a motion to introduce evidence relating to defendant's prior arrest and conviction in June 2005 for stealing a bicycle (§ 487, subd. (c)). The prosecution argued the evidence was relevant to showing defendant's active participation in a gang and that he committed the charged gun possession offenses with the intent to benefit his gang.

During the hearing on the motion, defense counsel objected to the evidence. Defense counsel acknowledged that defendant likely would testify and therefore the bicycle theft conviction would be admissible to impeach defendant, but defense counsel argued that evidence concerning the circumstances of the offense should be excluded under Evidence Code sections 352 and 1101, as more prejudicial than probative. The prosecutor responded that evidence that defendant said, "what gang are you from?" during the bike offense showed defendant was in a gang. Also, defendant's use of brass knuckles, which defendant said were from his "homies," also showed defendant was in a gang and intended to commit crimes for the benefit of his gang. In response, defense counsel noted the prior bicycle theft felony was not treated as a gang crime. The trial

court ruled that evidence of the prior conviction was admissible as relevant to showing defendant's involvement in a gang.

During the instant trial, Humberto Diaz, one of the boys who was with the victim during the bicycle theft, testified that defendant came up to the boys and asked the boys if they belonged to a gang. Diaz and his friends said, "No." Defendant then took Diaz's friend's bike. When the boy tried to take his bike back, defendant held up his brass knuckles and took off with the bike.

Police Officer Feimer testified that on June 14, 2005, three teenage boys waved at him to stop and one of the boys reported that someone had just stolen his bicycle. Feimer investigated the matter and found defendant, who matched the boys' description of the perpetrator. During an in-field identification, the boys identified defendant as the perpetrator. Defendant was found in possession of brass knuckles.

Peace Officer Denise Costales interviewed defendant on June 21, 2005, concerning the bicycle theft. Defendant told her he was affiliated with the Casa Blanca gang. Defendant also conceded he took the boy's bicycle because he thought it was nice, and admitted he was carrying brass knuckles his "homies" had given him. He claimed he would have used them if he had to.

During closing argument, the prosecutor described the circumstances of the bicycle theft and then declared, "What type of person does that, ladies and gentlemen?" The prosecutor also urged the jury to consider defendant's bicycle crime when considering whether there was a pattern of gang activity.

Defendant argues the prior bicycle theft evidence constituted inadmissible character evidence under Evidence Code section 1101, subdivision (a), which prohibits evidence of a person's character "to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies . . . that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*)). Such facts include "motive, opportunity, intent, preparation, plan, knowledge, [and] identity." (Evid. Code, § 1101, subd. (b).)

Uncharged misconduct "is admitted only with caution, as there is the serious danger that the jury will conclude that defendant has a criminal disposition and thus probably committed the presently charged offense. [Citations.] We have held that to be admitted, evidence of other crimes must be relevant to some material fact at issue, must have a tendency to prove that fact, and must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]" (*People v. Thompson* (1988) 45 Cal.3d 86, 109.) We apply the abuse of discretion standard when reviewing admission of evidence under Evidence Code section 1101. (*People v. Memro* (1995) 11 Cal.4th 786, 864.)

In the instant case, the People argue the bicycle theft evidence was relevant to showing defendant's intent to commit the gun possession crime for the benefit of his gang. In *Ewoldt, supra*, 7 Cal.4th at page 393, the court discussed the different purposes for which prior acts evidence may be admitted and the various degrees of similarity to the current charge required. *Ewoldt* specifically explained that "[e]vidence of *intent* is

admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. ‘In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.’ [Citation]” (*Id.* at p. 394, fn. 2.) Thus, in deciding whether or not to admit the evidence, the court was allowed to assume that defendant was present at the scene and that he committed the act alleged, regardless of the defense. Similarly, the prosecution was allowed to assume and argue that if defendant committed the charged act, he did so with the requisite intent. (*Ibid.*)

Here, some of the bike-offense evidence was relevant. Since defendant testified, the bike theft conviction was admissible as impeachment evidence. Also, evidence indicating defendant was involved in a gang was relevant. However, evidence of the crime was not relevant to showing intent because the bike crime was not sufficiently similar to the charged crime of gun possession crime. The bicycle theft was an entirely different crime than the charged gun possession crime. The charged crime did not involve a victim; the weapon was a gun rather than brass knuckles; the charged crime occurred over a year after the bike theft; there is no evidence that during the bike theft, defendant was wearing clothing advertising his gang; and the bicycle theft was not charged or prosecuted as a gang crime. The trial court therefore abused its discretion in admitting the evidence under Evidence Code section 352 because the evidence had minimal probative value, which was outweighed by its prejudicial nature.

Nevertheless, any error in admitting the prior misconduct evidence was harmless. “[T]he erroneous admission of prior misconduct evidence does not compel reversal

unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded. [Citations.]” (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019.)

Here, there was substantial evidence supporting defendant’s convictions, even aside from the evidence of the uncharged misconduct. As stated by defendant, the only real issues were whether at the time of the gun possession offense, defendant was actively engaged in a gang and whether he intended to commit the offense for the benefit of a gang. As discussed above, there was overwhelming evidence defendant was an active member of the Casa Blanca I.E. Riders gang at the time of the charged offenses, and that he illegally possessed the loaded, unregistered, concealed gun, while advertising his gang membership, with the intent to benefit his gang. We thus conclude any error in admitting the evidence was harmless under *Watson, supra*, 46 Cal.2d at page 836 and *Chapman, supra*, 386 U.S. at page 24.

7. Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/King
J.